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IN THE

# Supreme Court of the United States

OCTOBER TERM 1965

No. 1153

HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON, and COLUMBUS P. BRITTAIN,

*Petitioners,*

*vs.*

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, etc.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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*Petitioners,*

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LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, etc.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled cause on January 21, 1966.

### Citations to Opinions Below

The first opinion of the District Court in this litigation is reported in 238 F. Supp. 1016 (D. C. N. J. 1964). The

first opinion of the Court of Appeals is reported in 342 F. 2d 430 (3 Cir. 1965). The second opinion of the Court of Appeals is not yet reported (3 Cir. 1966), and is printed in Appendix A hereto.

## Jurisdiction

The judgment of the Court of Appeals was entered on January 21, 1966 (Appendix B, p. 6a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

## Questions Presented

1. Should not *certiorari* be granted in this case, which has been decided by the Third Circuit contrary to similar cases in the Second, Fourth and Ninth Circuits?

2. Should not *certiorari* be granted to review a judgment granting plaintiff only partial union membership, following a jurisdictional holding under the Landrum-Griffin Act that plaintiff was already a full member?

3. Should not *certiorari* be granted to correct error which a court of appeals acknowledges but which it believes itself helpless to correct through an incorrect view of "law of the case"?

4. Should not *certiorari* be granted to remedy a dangerously narrow view of the Third Circuit's role in labor cases?

## Statutes Involved

The statutory provisions involved are:

29 U. S. C. A. §402 (o), as follows (Section 3(o) of Labor Management Reporting and Disclosure Act):

> " 'Member' or 'member in good standing', when used in reference to a labor organization, includes

any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and by-laws of such organization."

29 U. S. C. A. §411 (a)(1), as follows (Section 101(a)(1) Labor Management Reporting and Disclosure Act):

"Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

29 U. S. C. A. §412, as follows (Section 102, Labor Management Reporting and Disclosure Act):

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

## Statement of the Case

Petitioners are four members of the international union of which respondent is a local. When they sought to transfer their membership from their original locals to respondent in accordance with the requirements of the international constitution, respondent refused to accept them. Thus deprived of their membership rights, petitioners brought suit under Section 102 of the Labor-Management Reporting and Disclosure Act (hereinafter the "Act"), 29 U. S. C. A. §412, specifically alleging violation of Section 101 (a) (1) of the Act, 29 U. S. C. A. §411 (a) (1), and asking for relief under the Act and under the international constitution (hereinafter the "constitution").

The district court held it had jurisdiction under the Act as construed in *Hughes* v. *Local 11 of International Bridge, etc.*, 287 F. 2d 810 (3 Cir. 1961), *cert. den.* 368 U. S. 829 (1961). In *Hughes* the same international constitution had been construed favorably to a plaintiff situated as are petitioners. As the district court construed the Act under that case, an action does lie "against a union for its refusal to accept a transfer of membership from another local of the same international." The trial court fully adjudicated favorably to petitioners their right under the international constitution to transfer their existing membership to respondent by a tender of their membership books. The constitution gave respondent no discretion but to accept such tender under the circumstances of this case.

However, the district court insisted that, under *Hughes*, it could only order relief in terms of the substantive portion of the statutory provisions involved. It issued a judgment granting petitioners "the rights guaranteed to them by Section 101(a)(1)" of the Act.

Petitioners preferred an order in broader terms, but they accepted the one prescribed by the district court since they believed that, to secure the rights guaranteed by the Act, they would have to tender their membership books and have them accepted by respondent, all as required by the union constitution. Phrased differently, petitioners believed (and believe) that the enforcement of the order requires compliance with the union constitution. Such compliance would automatically give petitioners full membership, since fractional membership is not possible under that constitution. Petitioners saw (and see) no defect in an order in equity which, by forcing a compliance within the court's jurisdiction, incidentally gives them an additional benefit.

Respondent, however, was unhappy with the judgment, and it appealed. With the appeal it sought by motion in the District Court a stay of the entry of the judgment because, it said, *inter alia*, "If the judgment is enforced giving plaintiffs membership in defendant union the basis for the appeal would be moot since this is the question to be decided on appeal." The stay was granted pending the outcome of the appeal, on condition petitioners continued to be assigned to work by respondent and upon the filing by respondent of a *supersedeas* bond. In the words of respondent's brief, its appeal sought "a reconsideration of the finding that a member of one local of an International Union who has fulfilled the constitutional requirements for transfer to another Local is already a 'member' of that second local." Petitioners defended that finding and secured a *per curiam* affirmance. 342 F. 2d 430. Pending the appeal, the International had amended its constitution to permit transfer between locals only if the local to which transfer was sought approved the transfer. Respondent had then by motion vainly sought to gain the appellate

court's approval to argue its appeal as if that amendment were applicable to this case. At the argument, both court and counsel conceded the *Hughes dicta* was no bar to relief.

Upon the affirmance and the expiration of the stay, petitioners sought the return of their membership books, still in evidence, from the court. Securing them after a delay, they presented them to the local in accordance with the requirements of the international constitution. There is no other method by which they could be transferred so as to enjoy either all the rights of membership or those expressly guaranteed by the Act. Nonetheless, respondent refused the tender.

Petitioners promptly moved before the district court to hold respondent in contempt. To petitioners' astonishment, the court, having held that "an action" will lie "under the Labor-Management Reporting and Disclosure Act against a union for its refusal to accept a transfer of membership" (238 F. Supp. 1018), now stated, "Well, it seems to me that the *Hughes* case suggests that this Court has no right to order membership" (page 5a of petitioners' brief below). In keeping with its new view, the district court refused a contempt holding. Thereupon the petitioners sought to bring this new complexity before the Court of Appeals by a petition for rehearing, but the delay in securing the books for tender having caused the time for this hearing to elapse, the Court refused to extend it. An appeal followed, with a defeat for petitioners which is the subject of this petition.

Meanwhile, while still refusing to honor in any way the requirements of the international constitution, respondent has condescended to permit petitioners the right to attend meetings and vote, but not the right to run for office. Petitioners must still pay dues to their old locals (for they are still carried as members there) and work fees to respond-

ent. Petitioners occupy a status for which there is no warrant in the union constitution.

On the appeal at bar from the district court's refusal to hold respondent in contempt, the Court of Appeals reviewed the litigation in some detail and with a great deal of sympathy, but it alleged it was unable to grant relief. Inferentially (for it is nowhere stated) the higher court concluded it was bound by the doctrine of the law of the case and could not disturb the *Hughes dicta,* "suggested" as binding by the district court and now inferred as being cemented in place by the first affirmance. It also vaguely implied that petitioners had no right to appeal from a refusal to hold respondent in contempt of a final judgment. While the reasoning of the Court of Appeals in its refusal to extricate plaintiffs from their morass is nowhere clearly stated, its outline of the facts is clear—so clear that petitioners cannot understand how the Court can also say the record is "confused, uncertain."

## Reasons for Granting the Writ

### 1. The opinion of the Court of Appeals for the Third Circuit is in conflict with the opinions of the Second, Fourth, and Ninth Circuits on the same matter.

In this case the Court of Appeals for the Third Circuit has determined that it is powerless under 29 U. S. C. A. §112 to enforce the union constitution's transfer provisions in favor of petitioners. This extraordinary ruling became the law of the Third Circuit when, in its latest opinion, it for the first time faced the issue created by petitioners' tender of membership books.

The Second, Fourth and Ninth Circuits are in direct disagreement.

The Second Circuit case is *Vars* v. *International Brotherhood of Boilermakers,* 320 F. 2d 576 (1963). There a wrongfully expelled union member was granted an injunction restoring him to membership.

The Fourth Circuit case is *Simmons* v. *Avisco Local 713, etc.,* 350 F. 2d 1012 (1965). In that case a union member brought suit alleging that his suspension from membership in the local was in violation of section 101(a)(5) of the Act, 29 U. S. C. A. §411(a)(5). He sought (1) an injunction to effect his restoration to membership and (2) money damages for injury to his reputation and resulting mental anguish. The Federal District Court granted a permanent injunction and entered judgment for plaintiff on a jury verdict of $15,000.00. The Court of Appeals affirmed. *Cf.* 350 F. 2d at p. 1018, where the injunction to effect his restoration to membership was held good.

The Ninth Circuit case is *International Brotherhood of Boilermakers* v. *Rafferty,* 348 F. 2d 307 (1965). In that case union members were expelled after trial on a charge of libel and other conduct alleged to be prohibited to members. They brought suit, claiming violation by the Union of the Act, specifically, of the Bill of Rights provisions. Judgment was granted in their favor, *inter alia,* to "restore to them all of their rights, privileges and benefits in the Union and Local, and to reinstate appellees as members in good standing thereof, the same as if they had never been penalized and expelled." (p. 309 of 348 F. 2d). This portion of the judgment (the only portion relevant to the case at bar) was affirmed on appeal.

On pages 314 and 315 of 348 F. 2d, the court discusses the extent to which Section 412 of the Act permits, in cases like *Ferger* and *Rafferty,* the granting of "such relief (including injunctions) as may be appropriate." It implies

that "relief" should be broadly construed, citing a definition thereof as including "deliverance from oppression, wrong or injustice." It concludes that, while in the case before it money damages were improper, "relief" in some cases could include them. The court never even questions the full return to membership ("the same as if they have never been . . . expelled") which the trial court granted.

**2. The rule of this case, requiring union membership as a jurisdictional prerequisite but granting less than membership as the maximum of statutory relief, cannot have been the legislative intent and should be corrected.**

The unfortunate state of the law in the Third Circuit, produced by the *Hughes dicta* and the two opinions in this case, requires little comment. This is so because of the frank acknowledgment of petitioners' plight, contained in the second opinion of the Court of Appeals. The absurdity of a rule which requires proof of membership as a jurisdictional requirement to get into court but sends the "successful" litigant out of court with only some of his membership rights is obvious.

However, the basis of the errors of the courts below requires a deeper analysis.

This case alleges a deprivation of rights granted by 29 U. S. C. A. §411 and asks for the relief provided by the Act and by the constitution of the International. Our theory was an action in equity seeking a mandatory injunction as provided by the Act and specific performance of the right to transfer under the union constitution. The courts below held those rights to be only those named in the Act and not all the rights granted by the union constitution. While petitioners (and three other Federal circuits) disagree with that holding, that is not the only reason we are here.

We are here because the courts below construed alleged limitations in Section 411 (the substantive statement) as a deprivation of power under Section 412 (the relief provisions). Because it could not (it thought) give petitioners all the rights of membership under Section 411, the district court decided it could give them no injunctive relief at all under Section 412.

Obviously, however, the court's adjective right to order transfer is complete and is unrelated to any limitation on the substantive rights to be enjoyed after transfer.

The courts below have failed to draw this distinction. They believe a mere statement in the judgment of the substantive rights to be enjoyed is somehow self-executing. It is almost as if the trial judge was striving manfully to help petitioners, unaware that Section 412 was in the law at all. If the judgment be regarded as self-executing, however, it creates a new class of *quasi* membership by judicial fiat as a kind of forced amendment to the union constitution. In the absence of fraud, the courts have no power to alter such a constitution. *United States* v. *Ames*, 99 U. S. 35 (1875).

In short, any limitation in Section 411 is unrelated to the broad equitable relief powers of Section 412. If, after such equitable relief, respondents believe petitioners have more substantive rights than they deserve, that may give respondent a right of action; but it does not have it now.

Moreover, it is to be noted that the confusion of the courts below as to the limits of substantive and adjective powers under the Act was never revealed until the contempt motion which began this proceeding. Only then could petitioners know of the courts' alleged helplessness under Section 412.

**3. The theory of "law of the case" should not bar relief in the Court of Appeals, but if it does, this Court should grant relief.**

While the Court of Appeals in its second opinion is sympathetic to petitioners' plight, it felt constrained for unexplained reasons to deny their plea. Presumably the Court of Appeals believed the theory of law of the case barred relief. In reaching this inferred conclusion, the higher court appeared not to realize the change in the district court's view following the first affirmance which we detailed above.

Thus the status of the case is similar to that in *Messinger* v. *Anderson,* 225 U. S. 436 (1912). There a Circuit Court of Appeals rendered a decison. Later the same point was otherwise decided by a state court. Then the Circuit was asked to agree with the state court decision, but it refused, citing law of the case as bar. Justice Holmes for this court said:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not to limit to their power. [Citing cases] Of course this Court, at least, is free when the case comes here. [Citing cases] In our opinion even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, because, at least, as against the decision of the circuit court of appeals, it was right."

As stated by this Court in *Southern Ry. Co.* v. *Clift,* 260 U. S. 316, 319 (1922), the law of the case does not supercede discretion; it merely directs it. And, in cases where

there is doubt whether the very decision held to be fixed in place by the doctrine was fully before the court on the prior hearing, law of the case even as a guide to discretion should not be applied. *Hartford Life Ins. Co.* v. *Blincoe,* 255 U. S. 129 (1921). *Cf. Connett* v. *Jerseyville,* 110 F. 2d 1015, 1018 (7 Cir. 1940); *Salvone* v. *Pilson,* 181 F. 2d 615 (C. A. D. C. 1950), *cert. den.* 339 U. S. 981 (1950).

In this case, it appears obvious that the Court of Appeals wanted to help petitioners but refused to do so only because of its own erroneous belief that it lacked the necessary power. As Justice Holmes held in *Messinger, supra,* even if the Court of Appeals does lack such power (which we do not admit), this Court is fully authorized to act. It is respectfully urged that this Court act, for otherwise the intent of Congress to protect the workingman from the union racketeeer will have been effectively thwarted.

**4. This Court should correct the dangerous and narrow doctrine of federal court jurisdiction now established by the Court of Appeals.**

The Court of Appeals by the *Hughes dicta* and the two opinions in this case has necessarily (even if unintentionally) concluded that it is limited under the Act to granting only those rights of membership stated in so many words in Section 101 (a) (1) of the Act. Such doctrine is of importance to millions of labor union members, and, if left on the books, could cause great confusion. We will mention in order some of the problems created:

(1) The limitation on federal action with the inferred suggestion that the petitioners must now go to state courts for relief contradicts the rule as to federal control of labor law laid down by Congress and this Court. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 244 (1959).

(2) The limitation on federal action violates the settled rule that, once a case is properly before a federal court, there is full jurisdiction in such court to dispose of all of it. *Hurn* v. *Oursler*, 289 U. S. 238 (1933); *Copra* v. *Suro*, 236 F. 2d 107, 116 (1 Cir. 1956). In the light of the broad grant of powers in Section 102 of the Act, there appears no ground for the narrow holding of the courts below.

(3) The judgment of the district court is broad enough in its terms to require the respondent to accept petitioners' request for transfer. This has been petitioners' view throughout this case. It was also respondent's view until the motion for contempt following the first appeal. Prior to that, the district court's self-imposed limitations applied in terms only to the provisions of Section 101. But when the court (on the motion for contempt) refused petitioners any form of the relief granted by the broad terms of Section 102, it created a roadblock to the very victory it had earlier awarded them. The district court's scruple about its power "to order membership" was only of academic interest to petitioners, who simply sought an order enforcing their transfer rights for the enjoyment of the membership already found to be theirs. But when, on the contempt motion, the court confessed itself utterly paralyzed by its own scruple, this case became truly, in the Court of Appeals' phrase, "lamentable." Now that the same scruple has paralyzed the Court of Appeals, only here can relief be found.

## CONCLUSION

**For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.**

Respectfully submitted,

BRACKEN & WALSH,
*Counsel for Petitioners.*
By: JOHN J. BRACKEN,
A partner.

Dated:

# APPENDIX A

## Opinion of the Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15393

HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON and COLUMBUS P. BRITTAIN,

Appellants,

v.

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 14, 1965

Before McLAUGHLIN, HASTIE and SMITH, *Circuit Judges*

PER CURIAM.

The problem before us in this appeal commenced when the four plaintiffs, then and now members of the International Association of Bridge, Structural and Ornamental

*Appendix A*

Iron Workers, AFL-CIO endeavored to transfer from their original local to the appellee which is the local for the area where plaintiffs now reside and work. Though this was in accord with the International constitution, the transfers were deliberately blocked by appellee. Plaintiffs sued Local 483 under the Labor Management Act asking for relief both under the latter and under the International constitution. The right to transfer was the true issue and plaintiffs prevailed in the district court. The Local appealed to this court. The district court was affirmed in a per curiam opinion which, in affirming the judgment, said: "* * * for the reasons so well stated by Judge Meaney in his opinion of May 7, 1964." 342 F. 2d 430 (1965). The district court in that opinion had noted that according to Tomko v. Hilbert, 288 F. 2d 625, 630 (3 Cir. 1961), the decision in Hughes v. Local 11, etc., 287 F. 2d 810 (3 Cir. 1961) "* * * held that an action did lie under the LMRDA against a *union* for its refusal to accept a transfer of membership from another local of the same international." The district court opinion then commented "The intentions of the defendant represent an attempt to avoid, in the present action, the rules of law set forth in the Hughes case and others to be cited." In that original district court action, the union defense had been that plaintiffs had not tendered their membership books to Local 483 as allegedly called for by the International constitution. The trial court held that the plaintiffs had complied with the provision. The court, however, concluded as to specifically granting membership to plaintiffs that "* * * an order so framed may be improper under the Hughes opinion." The court therefore in its order merely allowed plaintiffs the rights named with particularity in the Labor Management Act, Section 101(a)(i) i.e. "* * * the right to nominate candidates, to

vote in elections or referendums of defendant, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations as prescribed in the constitution and by-laws applicable to the defendant herein; * * *." After affirmance of the judgment plaintiffs tendered their books to the Local in order to obtain membership therein. Their offer was refused. It was then that appellants instituted the present proceeding asking the district court to hold the Local in contempt for defiance of the court's order. The judge took the position that under Hughes it would be improper to deny appellants the privileges attached to membership above detailed but that the formal transfer to membership could not be ordered. The judge said with reference to this: "It is an anomalous situation but nevertheless that seems to be the legal position that the courts have taken." And referring to the above quoted per curiam opinion of this court affirming his opinion in the suit on the merits in this litigation, he stated: "And since the Circuit Court saw fit to go no further than that this motion must be denied." Attempt was made to obtain a rehearing out of time on the original appeal but that was denied by this court.

All of the above forced plaintiffs to go forward with the instant appeal in the hope that this court would recognize the tragic position in which they have been placed by our said per curiam. The Hughes dicta above referred to had been discussed in plaintiffs' first appellate brief and by this court at that initial oral argument but in the light of the above mentioned per curiam the trial judge in this proceeding refused to permit the stated thoughts of this court during the oral argument of the first appeal to be presented to him.

*Appendix A*

The appellee indicated at oral argument of this appeal that it would not voluntarily budge from its position despite the admittedly remedial purpose of the Landrum-Griffin Act. Though the sought for union membership is effectively spelled out in Section 101, because formal membership in the desired local is not specifically there stated, these appellants are condemned to the unbearable status of being legally deprived of their named International constitutional right to be accepted as members by appellee. Because of the present status of the key problem involved, it is impossible to consider it on its merits in this action. We therefore suggest if plaintiffs should see fit to do so that they file in the district court a petition for clarification of the construction of Section 101(a)(i) of the Act in this circuit as it pertains to plaintiffs' predicament. Said petition inter alia to contain a full outline of what has happened to date in plaintiffs' efforts to obtain said transfers. The objective of course would be to eventually have this court directly pass upon the merits of the precise question and so resolve the present confused, uncertain situation regarding it. At this time we express no opinion whatsoever on the merits of the controversy.

The order of the district court of March 30, 1965 will be affirmed without costs to either party as against the other.

---

HASTIE, *Circuit Judge*, concurring.

I agree that the district court's order be affirmed and also agree that the plight of the appellants is lamentable. However, to me the jurisdictional basis of such a new petition as the per curiam opinion of this court suggests seems

so doubtful that I do not join in encouraging that procedure.

Judge Smith concurs in Judge Hastie's concurring opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

# APPENDIX B

## Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,393

---

HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON and COLUMBUS P. BRITTAIN,

Appellants,

*vs.*

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO
(D. C. Civil No. 316-62)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

Present: McLAUGHLIN, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court,

*Appendix B*

filed March 30, 1965, be, and the same is hereby affirmed, without costs to either party as against the other.

ATTEST:

IDA O. CRESKOFF
Clerk

January 21, 1966